

24805. Adulteration of canned tomato sauce. U. S. v. 100 Cases of Canned Tomato Sauce. Decree of condemnation and destruction. (F. & D. no. 32247. Sample no. 67257-A.)

This case involved canned tomato sauce that contained excessive mold.

On March 7, 1934, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 100 cases of canned tomato sauce at New York, N. Y., alleging that the article had been shipped in interstate commerce on or about January 13, 1934, by the Italian Food Products Co., from Long Beach, Calif., and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "1888 Brand Tomato Sauce."

The article was alleged to be adulterated in that it consisted in whole or in part of a decomposed vegetable substance.

The Italian Food Products Co. Inc., filed an appearance and claim for the product. On June 26, 1935, the time to answer having expired and no answer having been filed by the claimant, judgment of condemnation was entered and it was ordered that the product be destroyed.

W. R. GREGG, *Acting Secretary of Agriculture.*

24806. Adulteration of canned sardines. U. S. v. 78 Cases of Canned Sardines. Decree of condemnation and destruction. (F. & D. no. 32447. Sample nos. 61594-A, 61595-A.)

This case involved a shipment of canned sardines which were in part decomposed.

On March 30, 1934, the United States attorney for the District of Montana, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 78 cases of canned sardines at Havre, Mont., alleging that the article had been shipped in interstate commerce on or about October 10, 1933, by the California Packing Corporation, from Alameda, Calif., and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Sun-Kist Brand * * * California Sardines Tomato Sauce California Packing Corp. * * * San Francisco, Calif."

The article was alleged to be adulterated in that it consisted in part of a decomposed animal substance.

On July 29, 1935, the California Packing Co., having appeared as claimant, the case came on for hearing before the court, judgment of condemnation was entered, and it was ordered that the product be destroyed.

W. R. GREGG, *Acting Secretary of Agriculture.*

24807. Alleged adulteration of canned tuna. U. S. v. 200 Cases of Canned Tuna. Tried to the court and a jury. Verdict for claimant. Judgment releasing goods and taxing costs against Government. Appeal by Government as to latter provision. Decree modified by striking provision of judgment taxing costs against Government. (F. & D. no. 32552. Sample nos. 60762-A, 60765-A.)

On April 14, 1934, the United States attorney for the Western District of Washington, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 200 cases of canned tuna at Tacoma, Wash., alleging that the article had been shipped by the Dyson Shipping Co., on or about March 19, 1934, from San Francisco, Calif., into the State of Washington, and charging adulteration in violation of the Food and Drugs Act. The article was labeled in part: "Amocat Brand Tuna * * * distributed by West Coast Grocery Company, Tacoma, Washington."

The article was alleged to be adulterated in that it consisted in whole or in part of a decomposed animal substance.

On April 4, 1935, the French Sardine Co., Inc., having appeared as claimant for the property, the case came on for trial before the court and a jury. Evidence, oral and documentary, having been introduced and arguments of counsel heard, the jury on April 9, 1935, returned a verdict for the claimant. On April 16, 1935, judgment was entered ordering that the product be surrendered to the claimant, and that costs be taxed against the Government. Appeal was taken to the provision of the judgment taxing costs against the Government. On December 2, 1935, the Circuit Court of Appeals for the Ninth Circuit handed down the following decision striking from the judgment the provision taxing costs against the Government:

WILBUR, Circuit Judge: This action was begun by a libel in rem against 200 Cases of Tuna which were alleged to be adulterated, as that term is defined in §8 par. 6, T. 21 USCA, being §7, par. 6, of the Food and Drug Act of June 30, 1906. The French Sardine Company appeared as owners thereof and denied the truth of the allegation contained in the libel. The issue of fact was submitted to a jury which returned a verdict in favor of the claimant. The court, in entering judgment denying condemnation, included costs amounting to \$141.38. The Government appeals from this judgment.

It is conceded on this appeal that judgment for costs does not lie against the United States unless specially authorized by statute. This well known and long established rule has been recently stated by the Supreme Court in *U. S. v. Worley*, 281 U. S. 339, 344, and by this court in *U. S. v. Knowles Est.*, 58 F. (2d) 718. The appellee, however, contends that §10 of the Food and Drug Act (34 Stat. 768, 771, 21 USCA §14), does contain such statutory authority in the last sentence thereof, which is as follows:

The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

The appellee claims that as in an admiralty proceeding costs may be awarded against the United States (Suits in Admiralty Act, 41 Stat. 525-528; 46 USCA §§741-752; *John Shewan & Sons, Inc., v. U. S.*, 267 U. S. 86, 45 Sup. Ct. 238). It follows that the allowance of costs is proper in the case at bar because the allowance of costs is a part of "the proceeding in admiralty" which is to be conformed to in the proceedings upon a libel under the Food and Drug Act (§10), supra. The Supreme Court has not spoken on this exact question, but in the case of *443 Cans of Frozen Egg Product v. U. S.*, 226 U. S. 172, that court said: "We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process in rem, then giving the case the character of a law action, with trial by jury if demanded and with the review already obtaining in actions at law."

While the right to costs is ancillary to the judgment, it is a substantive right and not a mere matter of procedure. As stated in *Erwin v. U. S.*, 34 Fed. 470, "In its general acceptation 'proceeding' means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments and of executing. Ordinary proceedings intend the regular and usual mode of carrying on a suit by the due course of common law." *People v. White*, 14 How. Practice (N. Y.) 498.

The distinction between a right to costs and the procedure for the enforcement of that and other rights, is pointed out in *Fargo v. Helmer* (N. Y.), 43 Hun. 17, 19 (50 Sup. Ct. Rep. 17) where the court, quoting Judge Duer in *Rich v. Husson*, 1 Duer 617: "The rules by which proceedings are governed are rules of procedure; those by which rights are established and defined, rules of law. It is the law which gives the right to costs and fixes their amount. It is procedure which declares when and by whom the costs to which a party has a previous title shall be adjusted or taxed and when and by whose direction a judgment in his favor shall be entered." The right to costs is not a question of procedure but is a substantive right.

If the proper interpretation of §10 of the Food and Drug Act, supra, were a matter of doubt that doubt must be resolved in favor of the government. As stated by the Supreme Court in *Davis v. Corona Coal Co.*, 265 U. S. 222: "* * * The United States should not be held to have waived any sovereign right or privilege, unless it was plainly so provided."

The decree is modified by striking therefrom the judgment for costs and as so modified is

Affirmed.

W. R. GREGG, Acting Secretary of Agriculture.

24808. Adulteration of tomato puree. U. S. v. 8 Cases of Tomato Puree. Default decree of condemnation and destruction. (F. & D. no. 32851. Sample no. 71634-A.)

This case involved a shipment of tomato puree that contained excessive mold.

On June 25, 1934, the United States attorney for the District of Vermont, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of eight cases of tomato